

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>EDITH E. STEEVES</b>	:	DETERMINATION
	:	DTA NO. 814737
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1985, 1986	:	
and 1987.	:	

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Petitioner, Edith E. Steeves, 27 Kling Terrace, Voorheesville, New York 12186, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985, 1986 and 1987.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq., (Peter T. Gumaer, Esq., of counsel), brought a motion dated May 13, 1996, seeking an order of summary determination with prejudice, pursuant to 20 NYCRR 3000.9(b) and Tax Law § 687. Petitioner did not respond to the motion. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal began on the date for the response to this motion, or June 13, 1996. Based upon the motion papers, the affirmation of Peter T. Gumaer, Esq., dated May 9, 1996, the affidavit of Charles Bellamy, sworn to May 9, 1996 and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

***FINDINGS OF FACT***

1. Petitioner, Edith E. Steeves, timely filed New York State personal income tax returns for the years 1985, 1986 and 1987.

2. Petitioner filed refund claims of personal income tax for the years 1985, 1986 and 1987 in October 1994. No claims for refund or amended returns were filed by petitioner for these years prior to October 1994.

3. The Division of Taxation ("Division") issued to petitioner a Notice of Disallowance, dated December 27, 1994, denying all three of the "refund claim[s] you have filed" on the basis that they were not timely filed. The notice stated, in pertinent part, as follows:

"Under New York State Law (Tax Law section 687), refund claims for any overpayment of tax must be filed by the taxpayer within three (3) years from the date the return was filed or two (2) years from the date the tax was paid, whichever of such periods expires the later. As this three (3) year limitation on refund claims is statutory (a matter of law), only a change in the law would permit this Department to pay refund claims filed after the three (3) year limitation has expired."

4. The Division submitted the affidavit of Charles Bellamy, Tax Technician II, whose responsibility it was to review and process refund claims made by Federal pension recipients who were taxed on that income prior to 1989. Mr. Bellamy reviewed petitioner's refund claims for the years in issue and determined that the 1985 income tax return was filed on or before April 15, 1986; the 1986 income tax return was filed on or before April 15, 1987; and the 1987 income tax return was filed on or before April 15, 1988. No amended returns were filed for any of the years in issue. As stated above, petitioner's refund claims for each of these years were filed in October 1994.

5. Petitioner argues that she should not be penalized for filing the incorrect forms and that refunds should be issued regardless of which forms were filed, i.e., IT-113X, claim for refund, or the IT-201X, amended personal income tax return. However, petitioner never disclosed which form she used to request her refund, and her choice of forms was not a basis for disallowance of the claims.

### ***CONCLUSIONS OF LAW***

A. On March 28, 1989, the United States Supreme Court issued Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891). Davis held that state income tax schemes which provide for inconsistent treatment of state and Federal retirement benefits violate 4 USC § 111, which protects Federal employees from discriminatory state taxation, and further held that such schemes are unconstitutional under the doctrine of intergovernmental tax immunity.

B. At the time of the issuance of Davis, the Tax Law provided for similarly discriminatory treatment of Federal and State retirement benefits. Specifically, Tax Law former § 612(c)(3) provided that pensions to officers and employees of New York State and its political subdivisions were excluded from New York State income tax. At the same time, the Tax Law contained no similar provision for pensions to Federal retirees; such pensions were therefore subject to tax. In an apparent effort to remedy this situation, the Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (see, L 1989, ch 664; Tax Law § 612[c][3][ii]) and thereby place both State and Federal retirees on equal footing. This remedy, however, was explicitly prospective and the Davis decision did not address the issue of retroactive application of its holding. At the time, the Division of Taxation took the position that Davis applied prospectively only and therefore denied refunds of tax on Federal pensions for years prior to 1989 even where timely refund claims were filed. Federal pensioners disagreed and commenced litigation in New York and throughout the country (see, e.g., Duffy v. Wetzler 148 Misc 2d 459, 555 NYS2d 543, mod 174 AD2d 253, 579 NYS2d 684, appeal dismissed 80 NY2d 890, 587 NYS2d 900, revd 509 US 917, 125 L Ed 2d 716, on remand 207 AD2d 375, 616 NYS2d 48, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied \_\_\_ US \_\_\_, 130 L Ed 2d 673).

C. The issue of the retroactive application of the Davis holding was resolved in the affirmative in Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74). In that case, while the Court held that the rule announced in Davis was to be given full retroactive effect, it did not provide relief to the petitioners therein. Rather, citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), the Court held that a state was free to choose the form of remedy it would provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process (id., 125 L Ed 2d at 88, 89). In this context, Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a

"fair" opportunity to challenge the accuracy and legal validity of the tax and a clear and certain remedy for any erroneous or unlawful tax collection (see, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 39, 110 L Ed 2d at 37, 38).

D. Harper thus requires that Davis be given retroactive application. Accordingly, applying Davis to the instant matter, it is clear that petitioner "overpaid" her income tax for the years at issue within the meaning of Tax Law § 687(a) (see, Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119, 120).

E. Tax Law § 687(a) controls refunds of overpayments of income tax in New York and provides, in relevant part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. . . ."

F. The dispute in the instant matter involves the time limitations portion of Tax Law § 687(a). Pursuant to this section, petitioner was required to file a refund claim within three years from the date of filing of her return for the years at issue. Accordingly, the question presented becomes whether the limitations period set forth in Tax Law § 687(a), as applied in this instance, complies with Federal due process requirements under the standard enunciated in McKesson.

G. In McKesson, the Court discussed various constitutionally permissible procedural requirements available to a state to protect its interest in maintaining fiscal stability:

"The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions, refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 45, 110 L Ed 2d at 41; emphasis supplied.)

The three-year statute of limitations at issue herein falls well within the range of permissible procedural protections discussed in McKesson.

H. Apart from the due process analysis utilized in the McKesson and Davis line of cases, the Appellate Division has indicated that the limitations provisions of Tax Law § 687(a) operate to bar refund claims filed beyond the statutory period even where, as here, the tax in question is subsequently determined to be unconstitutional (see, Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119, supra). The court in Fiduciary Trust Co. relied on the principle that there can be no recovery of taxes voluntarily paid, without protest, under a mistake of law (id., 502 NYS2d at 120). In this case, there is no evidentiary basis nor is there any legal authority supporting the proposition that petitioner's inclusion of Federal pension income on her return and payment of tax thereon for the years at issue represents a "payment under demand" rather than an "erroneous overpayment" by petitioner. Petitioner's payment of tax on Federal pension income per her 1985, 1986 and 1987 personal income tax returns represents a voluntary payment under a mistake of law with no subsequent timely protest, and, therefore, no recovery may be had. (Id.)

I. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party.

In the instant matter there are no material issues of fact, and therefore, the Division of Taxation is entitled to summary determination in this matter (20 NYCRR 3000.9[b][1]).

J. Petitioner appears to raise the argument in her petition that she was provided the incorrect forms by the Division when she requested information on applying for a refund.<sup>1</sup> However, regardless of whether she filed an amended return which would have indicated an overpayment and an amount owing to her or the application for refund, her request was properly

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<sup>1</sup>Petitioner never disclosed which form she filed to request her refund for the years in issue.

interpreted as an application for refund by the Division as evidenced by its response of December 27, 1994, in which the Division specifically and unequivocally referred to "the refund claim[s] you have filed."

Given the Division's interpretation, the forms filed by petitioner were proper but not timely filed.

K. The Division of Taxation's motion for summary determination is granted and its disallowance of petitioner's refund claims for 1985, 1986 and 1987 is sustained.

DATED: Troy, New York  
August 8, 1996

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE